IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 16-0739

ALPS PROPERTY & CASUALTY INSURANCE COMPANY, d/b/a Attorneys Liability Protection Society, a Risk Retention Group,

Plaintiff and Appellees,

v.

McLEAN & McLEAN, PLLP; DAVID McLEAN; MICHAEL McLEAN; and MIANTAE McCONNELL,

Defendants and Appellants.

McLEAN & McLEAN, PLLP and MICHAEL McLEAN,

Counter Plaintiffs and Appellants,

v.

ALPS PROPERTY & CASUALTY INSURANCE COMPANY,

Counter Defendants and Appellees.

JOSEPH MICHELETTI and MARILYN C. MICHELETTI,

Intervenors and Appellants.

On Appeal from the Montana Third Judicial District Court,
Deer Lodge County, Cause No. DV-14-82
Hon. James A. Haynes

AMICUS CURIAE BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION

APPEARANCES

Justin P. Stalpes
Beck, Amsden & Stalpes, PLLC
1946 Stadium Drive, Suite 1
Bozeman, MT 59715
T: (406) 586-8700/F: (406) 586-8960
justin@becklawyers.com

Attorneys for Amicus MTLA

William M. O'Leary
Fleming & O'Leary, PLLP
P.O. Box 527
Butte, MT 59703
T: (406) 723-5600/F: (406) 723-5602
wmo@flemingandolearlylaw.com

Attorneys for Joseph F. and Marilyn C. Micheletti

Timothy B. Strauch
Strauch Law Firm, PLLC
257 West Front Street, Suite A
Missoula, MT 59802
T: (406) 532-2600/F: (406) 542-3332
tstrauch@strauchlawfirm.com

Attorneys for McLean & McLean, PLLP

Patrick T. Gallagher
Wall, McLean & Gallagher, PLLC
P.O. Box 1413
Anaconda, MT 59711
T: (406)563-8409/F: (406) 563-8400
pat@mlfpllc.com

Attorneys for Michael McLean

Martha Sheehy
Sheehy Law Firm
P.O. Box 584
Billings, MT 59103
T: (406)252-2004/F: (866) 477-5953
msheehy@sheehylawfirm.com

Attorneys for ALPS Property & Casualty Insurance Company

Bradley J. Luck
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula, MT 59807-7909
T: (406) 523-2500/F: (406) 523-2595
bjluck@garlington.com

Attorneys for ALPS Property & Casualty Insurance Company

Stefan Wall
Wall, McLean & Gallagher, PLLC
P.O. Box 1713
Helena, MT 59624
T: (406)442-1054/F: (406)442-6455
stefan@mlfpllc.com

Attorneys for David McLean

Janice M. Casarotto
Casarotto Law Firm, PLLC
P.O. Box 3723
Butte, MT 59702
T: (406) 565-2726
casarottolawfirm@gmail.com

Attorneys for Lillian Johnson

Doug Scotti
Sharon M. Morrison
Morrison & Frampton, PLLP
Frank Lloyd Wright Building
341 Central Avenue
Whitefish, MT 59937
T: (406)862-9600/F: (406) 862-9611
doug@morrisonframpton.com
smmmontana@gmail.com

Attorneys for Miantae McConnell

Mikel L. Moore
Moore, Cockrell, Goicoechea & Johnson, P.C.
P.O. Box 7370
Kalispell, MT 59904-0370
T: (406) 751-6000/F: (406) 756-6522
mmoore@mcgalaw.com

Attorneys for Amicus Property Casualty Insurers Association of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Case Law:

Federal and State Statutes:

Other Authorities:

ISSUE PRESENTED

Whether through "rescission" an insurer may deprive a third party claimant of a vested right due to a misrepresentation in one insured's application that is unknown to an innocent insured, or whether "reformation" of the insurance contract, as recommended by the American Law Institute, is the appropriate, equitable and legally sound remedy?

STATEMENT OF THE CASE

ALPS Property & Casualty Insurance Company d/b/a Attorneys Liability Protection Society (ALPS) seeks to rescind a professional liability insurance policy issued to David McLean, Michael McLean and their firm, McLean & McLean, PLLP (M&M). There are three separate claims pending against David, Michael and M&M. These claims are attributable to the acts of David. Michael, however, bears exposure to each of the three claims because he is vicariously liable for David's acts arising out of his partnership in M&M.

ALPS attempted to rescind the entire policy on September 26, 2014. *Notice of Rescission of Coverage*, Doc. 35, ¶ 14 & Ex. 9, Opening Br., App. Tab 6. Before then, ALPS had received notice of two of the three pending claims – those of McConnell and Johnson. Approximately one month after ALPS attempted to rescind, ALPS received notice of Michelletti's claim against the McLeans and their firm.

STATEMENT OF FACTS

The parties have adequately stated the facts and they will not be recited here.

STANDARD OF REVIEW

Amicus agrees with the Standard of Review as stated by Appellants.

SUMMARY OF ARGUMENT

Rescission of a liability policy against which claims are pending does not place the parties to the contract in the position they would have been had the contract never been consummated. To the contrary, and in contravention of the purpose of rescission, allowing a liability insurer to rescind places the insurer in a much better position than it was at the expense of innocent third party claimants.

The district court erred by rescinding the policy. The court erred because the rights of McConnell and Johnson vested before ALPS attempted to rescind. Under Montana law, an insurer may not affect the rights of a third party to a contract for liability insurance after those rights had vested. This is true regardless of Montana's warranty amelioration statute (Mont. Code Ann. § 33-15-403) or Montana's statute dictating the process for rescission (Mont. Code Ann. § 28-2-1713).

The district court likewise erred by rescinding the policy as to the Michelletti claim for several reasons.

First, Michael did not misrepresent anything to ALPS. Rather, ALPS attempted to rescind the policy because David failed to disclose his Illegal Acts.[1] ALPS contends that, had it known about David's Illegal Acts, it would not have contracted to accept the risk for the premium charged. But, had Michael known about the Illegal Acts, he likely would have taken action to protect himself against the risk posed by David. After all, upon learning of the Illegal Acts, Michael took immediate action to report David's activities to ALPS, M&M's clients, law enforcement and the State Bar.

On these facts, Michael and ALPS made a mutual mistake. Reformation of the contract, rather than rescission, is therefore the appropriate remedy.

Second, even if David's misrepresentation is attributable to Michael, Michael did not defraud or intend to deceive ALPS. In such cases, the American Law Institute recommends equitable reformation of the insurance contract, rather than wholesale rescission. This is because rescission is economically inefficient and places the insurer in a better position than it was in prior to the contract. That is because the insurer would then be allowed to avoid payment of a claim while keeping premiums paid by misrepresenting insureds who do not file claims.

[1] The Illegal Acts of David are described and defined in M&M's opening brief. In sum, the Illegal Acts included theft of money belonging to David's clients and ABOTA.

Third, genuine issues of material fact exist that precluded the district court from making a determination that the claims fell outside the scope of the policy. The ALPS policy excludes coverage where any "Insured knew or reasonably should have known or foreseen that the act, error, omission or Personal Injury might be the basis of a Claim." The district court incorrectly found that, because a statute of limitations defense was pled by Costco, David reasonably should have known that his error in missing the statute of limitations would lead to a claim. In doing so, the district court inappropriately made factual determinations central to the underlying malpractice claim against M&M.

ARGUMENT

1. The Purpose of Rescission is Defeated by Allowing ALPS to Rescind a Contract for Liability Insurance.

The district court erred by rescinding the contract because it used an equitable doctrine to create a windfall as to one party at the expense of innocent third party beneficiaries of the insurance contract. The purpose of rescission is to place the parties in the position they were in before the contract was consummated. *Scott v. Hjelm*, 188 Mont. 375, 380, 613 P.2d 1385, 1387 (1980). Rescission is not intended to punish one party for making a misrepresentation nor to allow another party to profit because another has made a misrepresentation.

Allowing a liability insurer to rescind a liability policy in light of a misrepresentation made by an insured runs afoul of the purpose of this equitable

doctrine. Where an insured has made a misrepresentation to a liability insurer in an application, rescission of the entire insurance contract overcompensates the insurer and places it in a better position. *See* Brian Barnes, *Against Insurance Rescission*, 120 Yale L.J. 328, 335 (2010). This is especially true where the misrepresentation was (at worst) an innocent misrepresentation, as in Michael's case. *Id.* ("Rescission overcompensates insurers in innocent misrepresentation cases because it allows them to retain the premiums of misrepresenting insureds who do not file claims.").

In almost every case, an insurer only discovers a misrepresentation through the investigation of a claim. *Id.* If wholesale rescission is available to an insurer who discovers a misrepresentation while investigating a claim, the insurer could avoid liability for pending claims, all while keeping premiums paid by those policy holders who will not file claims but who also made misrepresentations on their applications. Thus, insurers would be unquestionably in a better position than they were before the contract was entered into.

Conversely, rescission places the (former) insured in a decidedly worse position. Thomas R. Foley, Note, *Insurers' Misrepresentation Defense: The Need for a Knowledge Element*, 67 S. Cal. L. Rev. 659, 662-63 (1994) ("[I]f a court grants rescission, the insurance buyer may be in a much worse position than existed prior to contract formation. … First, the insurance buyer [such as Michael] will be worse off if she could have obtained insurance with another insurer or for a

higher price had she not inadvertently misrepresented. … Second, even if an insurance buyer was absolutely uninsurable at any price on account of the misrepresented fact, had she been uninsured she could have taken greater precautions to prevent the loss or forgone the risky activity entirely.").

Finally, the benefit to the insurer – who is in the business of accepting risk – comes at the expense of an injured third party claimant. Liability insurance is intended to provide compensation to victims of negligence. It is immaterial that legal malpractice insurance is not mandatory. Montana's public policy considerations that favor adequate compensation for victims apply to contracts for insurance even when a particular type of coverage is not mandatory. *Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 389, 862 P.2d 1146, 1148 (1993).

Allowing insurers to be subsidized by the non-claim-filing individuals who made a misrepresentation in their application and benefit by avoiding claims made by deserving third party claimants is not supported by the principles underlying the remedy of rescission. Rather, placing the risk of application mistakes with insurers – especially where those mistakes are made innocently as in Michael's case – is the better policy and the law in Montana. Insurers can spread the loss "over a large number of premium-paying individuals or entities," while insureds buy polices to "avoid uncertainty and the risk of such a large personal loss." Foley, *Insurers' Misrepresentation Defense*, 67 S. Cal. L. Rev. at 673-74.

2. Allowing Rescission of a Liability Insurance Policy Encourages Post-Claim Underwriting and Inadequate Risk Assessments By Insurers.

The district court's decision allowing rescission permits and encourages insurers to engage in "post-claim underwriting," in which the insurer postpones a full investigation into insurability until an insured makes a claim. Caroline Wood, *A Reformation Remedy for Educators Professional Liability Insurance Policies*, 65 Emory L.J. 1411, 1422-23 (2016). Post-claim underwriting is disfavored because it allows an insurer to benefit from the reduced costs of its own inadequate risk assessment. Thomas C. Cady & Georgia Lee Gates, *Post Claim Underwriting*, 102 W. Va. L. Rev. 809, 819 (2000) ("The insurer, [...] by fixing the odds has opportunistically placed itself in a win-win situation in which the insured is always the loser. Therefore, post-claim underwriting renders the insured especially vulnerable to opportunistic behavior on the part of the insurer.") (internal quotations omitted).

Here, Michael was a separate named insured. He was required to fill out a separate application by ALPS. He filled out that application truthfully and completely. Nevertheless, ALPS seeks to punish Michael for his lack of knowledge of David's conduct by rescinding Michael's contract for liability insurance after claims have been filed.

At worst, Michael's folly was inadequate attention to David's client files and the trust account which may have alerted Michael earlier to David's misconduct.

However, in its underwriting process, ALPS did not ask Michael about the level of scrutiny he gives to David's files or the trust account. Rather, ALPS inquired as to Michael's knowledge regarding acts that may result in future claims, to which Michael honestly answered that he had none. Only after Michael submitted claims did ALPS seek to rescind the policy.

Allowing ALPS to rescind that policy now – even though Michael answered truthfully and completely all of ALPS's questions on the application – allows and encourages ALPS to ask overly broad and unspecific questions in its application and use post-claim underwriting to reduce its exposure to risks it inadequately assessed before it began accepting premiums.

3. Insurers May Not Rescind a Liability Insurance Policy After a Third Party Claimant's Rights Have Vested.

In Montana, an insurer may not rescind a policy for liability insurance as to a claim brought by a third party claimant after the third party claimant's rights under the policy have vested. *McLane v. Farmers Ins. Exch.*, 150 Mont. 116, 120, 432 P.2d 98, 100 (1967). In *McLane*, this Court held such vesting can occur either at the time of the accident, or at the time of the insurer's implied waiver of the right to rescind. *Id.* However, and most importantly, in either case the insurer cannot affect a third-party's rights once they have vested. *Id.*

Montana law is consistent with the general rule. As stated in American Jurisprudence, 2d.:

> The cancellation[2] of an insurance policy does not affect rights which have already accrued under the policy in favor of the insured or of a third person, and consequently, notice of the insurer's previous election to terminate the policy, given the insured after a loss has occurred, is manifestly insufficient to avoid liability under the policy for such loss.
>
> A surrender of a policy found to have been made in consideration of the return of unearned premiums is no defense against liability for a prior loss.

43 Am. Jur. 2d. § 403.

M&M carried a claims made policy. When ALPS received notice of the claims, those claimants' rights under the policy vested. Because the rights of McConnell and Johnson vested before ALPS attempted to rescind the policy, the rescission is not effective as to those claims.

That the rights of McConnell and Johnson vested when the claim was filed is consistent with Montana's statutory and common law, which impose duties upon an insurer to a third party claimant at that time. For example, Montana's Unfair Trade Practices Act imposes numerous duties upon a liability insurer owed to a third party claimant, including the duty to advance pay tangible damages before final settlement or adjudication when liability is reasonably clear. *Ridley v. Guar. Ins. Co.*, 286 Mont. 325, 338, 951 P.2d 987, 994 (1997). The common law also imposes a duty of good faith and fair dealing by a liability carrier to a third party

[2] Cancellation in this context is defined as an insurer's exercise of its right to rescind. 43 Am. Jur. 2d. § 397. Therefore, this section is squarely relevant to this case.

claimant. *Brewington v. Employers Fire Ins. Co.*, 297 Mont. 243, 249, 992 P.2d 237, 241 (1999). These duties owed by a liability insurer to a third party claimant are "triggered" when a claim is made. *Stuart v. State Farm Mut. Auto. Ins. Co.*, 27 M.F.R. 453, 458 (D. Mont. 2000).[3]

Therefore, where an insurer issues a claims made policy[4] (such as in this case), a third party claimant's rights under the policy vest when the claim is filed.

---

[3] *See also Thoracic Cardiovascular Associates, Ltd. v. St. Paul Fire and Marine Ins. Co.*, 181 Ariz. 449, 453, 891 P.2d 916, 920 (Ariz. 1994) ("Because it triggers coverage, transmittal of the notice of the claim to the insurer is the most important aspect of the claims-made policy").

[4] Where an insurer issues an occurrence based policy, the rights vest at the time of the incident. This is the rule set forth in 43 Am. Jur. 2d. § 403, which states that rights vest when a "loss" has occurred.

The federal district court of Montana held in *Robb v. State Farm Mut. Auto. Ins.* that, in cases where the legislature has imposed mandatory minimum insurance, an injured third party claimants' rights to the extent the legislature requires insurance vest at the time of the accident. 2006 WL 3354135 (D. Mont. Oct. 23, 2006). According to *Robb*, because Montana's Mandatory Liability Protection Act made the lawful operation of a motor vehicle contingent upon carrying liability insurance, "[o]nce liability coverage is issued and a driver is permitted to operate the vehicle, the public is entitled to rely upon it until it is prospectively cancelled in the legislatively prescribed fashion. To hold otherwise would "tend to emasculate the act and defeat its express purpose."

The *Robb* court did, however, limit the amount of available insurance to the statutory minimum, which is inconsistent with a finding that a third party claimants rights to the insured's policy had vested. Whether limiting the available insurance to the minimum insurance obligation is appropriate is not before the Court and may be addressed another day.

Because the liability insurer "cannot affect a third-party's rights once they vested," Montana law prohibits a liability insurance carrier from rescinding a policy as to the third party claimant's loss in light of a misrepresentation made by an insured in the application for insurance that was discovered after the claim was filed.

As a result, the district court's decision violates Montana law and the general rule as stated in American Jurisprudence, cited above. Reversal is appropriate.

4. Montana's Warranty Amelioration Statute Does Not Apply in the Liability Insurance Context – Especially Where A Third Party Claimant's Rights Under a Policy Have Vested.

The district court relied heavily on Montana's warranty amelioration statute, Mont. Code Ann. § 33-15-403, as authority allowing ALPS to rescind the policy. However, Mont. Code Ann. § 33-15-403 does not apply because an insurable loss had already occurred and claims had been made.

It is well settled that:

> The right to cancellation[5] is sometimes granted by statutory provisions, but the conditions under which the right may be exercised as stated in such statutes, must be met before the insured or the insurer will be allowed a statutory right of cancellation. **As to an insurer, however, it has been held that a substantial compliance with such statutes is sufficient where a loss has not occurred**.

[5] Cancellation in this context is defined as an insurer's exercise of its right to rescind. 43 Am. Jur. 2d. § 397. Therefore, this section is squarely relevant to this case.

43 Am. Jur. 2d. § 403 (emphasis added); *McLane*, 150 Mont. at 120, 432 P.2d at 100 (no party to an insurance contract can do anything to affect the rights of a third party claimant after they have *vested*).[6]

Therefore, the district court erred by allowing ALPS to rescind the policy pursuant to Mont. Code Ann. § 33-15-403 because losses had occurred and third party claimants' rights had vested.

5. Reformation, Rather Than Rescission, Is The Appropriate Remedy.

The equitable and legally correct remedy in this case is to reform the insurance contract, not wholesale rescission. Such a remedy would allow ALPS to collect an additional premium from the insured, but would not deprive the innocent third party claimants of their ability to collect upon the insurance policy – to which they have rights.

Reformation is the appropriate remedy in this case for two reasons. First, reformation is supported by Montana law because Michael did not make a misrepresentation to ALPS. Rather, neither ALPS nor Michael knew about David's Illegal Acts. Where parties to a contract have made such a mutual mistake, reformation, not rescission, is mandated by Montana law.

---

[6] The legislature adopted the warranty amelioration statute before *McLane* was decided. Nevertheless, the Court held that the insurer could not rescind the policy or avoid paying the loss after the rights of the third party claimant had vested. *Id.*

Second, as stated by the American Law Institute, reformation, rather than rescission, is the preferred remedy to wholesale rescission of a liability insurance policy because rescission is inequitable and economically inefficient.

a. Montana Law Requires Reformation, Rather Than Rescission, in This Case.

In Montana, when two parties to a contract have made a mutual mistake, equitable reformation of the contract, rather than rescission, is the appropriate remedy. Montana law states:

> When, through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

Mont. Code Ann. § 28-2-1611.

The facts of this case demonstrate that Michael and ALPS were operating under a mutual mistake. The purported basis of rescission is that David did not disclose the Illegal Acts in his application. Further, ALPS's policy states that the applications are considered a part of the contract:

> 2.21 Policy means this Lawyers Professional Liability Insurance Policy that the Company has issued to the Named Insured, including all endorsements attaching hereto, and including all current and previous application forms any Insured has delivered to the Company.

Opening Br., App. Tab 9.

Michael and ALPS were each parties to this contract, which included the applications and the insurance policy. Neither was aware of David's illegal acts. Had Michael known about the acts, he would have informed ALPS (as evidenced by his behavior in promptly reporting the acts after they were discovered) and taken action to protect himself from liability. Therefore, Michael and ALPS – each parties to this contract – were operating under a mutual mistake.

Because Michael and ALPS were mistaken about David's illegal acts, Montana law states that equitable reformation, rather than rescission, is the appropriate remedy. Mont. Code Ann. §§ 28-2-1611-1612. Therefore, the district court erred by rescinding the liability policy. Guidance on factors important to equitable reformation, as well as the policy reasons which support it as a preferable remedy to rescission in cases such as this one, have been provided by the American Law Institute and are discussed in the next section.

b. The American Law Institute's Recent Recommendation to Equitably Reform Liability Policies Where Non-Fraudulent Misrepresentations Were Made in the Insurance Application.

Reformation, rather than rescission, is recommended by the American Law Institute (ALI) where an insured has non-fraudulently (such as in Michael's case) failed to alert an insurer about a fact that is material to the insurer's agreement to accept the risk. The American Law Institute (ALI) drafts, approves, and publishes Restatements of the Law, Principles of the Law and model codes. The ALI's Draft

Principles of the Law of Liability Insurance (Principles) offers recommendations distilled from input across the industry, including judges, professors, and practitioners representing the insurance industry and policyholders.

Former ALI Director Lance Liebman stated that the goal of the Principles was to draft "coherent doctrinal statements based largely on current state law, but also grounded in economic efficiency and in fairness to both insureds and insurers." Caroline Wood, *A Reformation Remedy for Educators Professional Liability Insurance Policies*, 65 Emory L.J. 1411, 1422 (2016). The objective of the recommendations was to reduce litigation over insurance coverage by providing a streamlined approach to policy interpretation. *Id.*

In the Principles, ALI recommends against the harsh remedy of rescission in light of a non-fraudulent misrepresentation in an application for liability insurance. The recommendation was made not only to ensure that liability insurance is available to innocent victims, but also because rescission is economically inefficient. According to comments made by ALI in reference to the rescission of a liability policy:

> The strict-liability version of the misrepresentation defense is also inefficient, insofar as it results in a misallocation of risk. Policyholders purchase liability insurance in significant part because of the efficiency gains from shifting the financial risks of their negligent conduct to insurers. Therefore, this Section articulates a rule that exempts innocent misrepresentations from the most draconian remedies available under the misrepresentation defense. Specifically, this Section limits the remedies of claim-denial and policy-rescission to misrepresentations that are either

> intentional or reckless, where the efficiency and fairness arguments for those remedies are strongest.

Michael F. Aylward, Lorelie S. Masters, *A "Principled" Approach to Coverage? The American Law Institute and Its Principles of the Law of Liability Insurance*, 81 Def. Couns. J. 117, 133 (2014).

ALI's current draft of the Principles recommends a two-step approach to determine the appropriate reformation in light of a misrepresentation on an insurance application. The approach is consistent with Montana's equitable reformation statutes, Mont. Code. Ann. §§ 28-2-1611-1612, which require revising a contract so far as it can be done equitably and without prejudice to rights acquired by third parties under the contract.

Section 12 of the Principles state:

> If the requirements of § 8(2)(a), § 8(2)(c), and § 8(2)(d)[7] are met, but the misrepresentation was neither reckless nor intentional, as those terms are defined in § 11:
>
> (a) If the insurer would have issued the same policy but at a higher premium if it had received the correct information at the time of the application or renewal, the insurer must pay the claim but may collect from the insured or deduct from the claim payment the additional premium that would have been charged.
>
> (b) If the insurer would not have issued the policy for any premium had it received the correct information at the time of the application or

[7] Section 8(2)(a), § 8(2)(c), and § 8(2)(d) require that the misrepresentation be: intentional or reckless, material, and reasonably relied upon by the insurer. Principles of the Law of Liability Insurance § 8 DD (2016).

> renewal, the insurer must pay the claim but may collect from the insured or deduct from the claim payment a reasonable additional premium for the increased risk.
>
> (c) Once the insurer has paid the claim it may cancel the policy.

Principles of the Law of Liability Insurance § 12 DD (2012) (June 2017 update), App. 1:1.

Therefore, the ALI approach depends on whether the insurer would have issued the policy had the misrepresentation not occurred. If the insurer would have issued the policy even in light of the true facts, the insurer may collect the additional premium that would have been charged. However, if the insurer would not have issued the policy, then the ALI approach permits the insurer to collect "a reasonable additional premium for the increased risk."

The insurer bears the burden of proof with respect to these elements. Principles of the Law of Liability Insurance § 12 DD (2012) (June 2017 update). (cmt. d). App. 1:2. Thus, the insurer must prove either that the policy would not have been issued had it been aware of the true facts or that the policy would have carried a higher premium. In the latter case, the insurer has the burden of proving the amount of the additional premium the insurer would have charged if it had issued a policy with the knowledge of the correct facts. Evidence important to the resolution of this issue would include examples of policies that were issued for the

asserted premium under circumstances closely similar to those of the policyholder at the time of the application or renewal.

Having paid the loss, the insurer may then cancel the policy prospectively within a reasonable time after discovering the misrepresentation.

Under this approach, no party or beneficiary to the contract may cry foul. The innocent third party claimant is not deprived of insurance proceeds to compensate her for the loss; an insured is not deprived of liability coverage; and the insurer is allowed to collect reasonable additional premiums that adequately compensate it for covering the risk.

6. Genuine Issues of Fact Preclude A Determination That The Claims Fall Outside the Scope of Coverage.

The district court incorrectly determined that, even if the policy were not rescinded, the third party claims were not covered. Genuine issues of fact preclude such a holding.

By way of background on the third party claims, the McConnell and Johnson claims contain allegations of theft, which ALPS contends (and the McLeans do not dispute) are not covered by the ALPS policy. However, the McConnell and Johnson claims also include non-theft related allegations that likely are covered by the ALPS policy.

The Michelletti claim does not include any allegation of theft. Rather, Michelletti alleges that M&M failed to file his claim within the applicable statute

of limitations. David had filed a lawsuit against Costco on Michelletti's behalf in Montana. In Costco's answer, it alleged that Colorado law applied to the *Michelletti v. Costco* lawsuit. Colorado has a two-year statute of limitations, whereas Montana's three-year statute applies to the Michelletti claim. David filed the claim more than two years, but less than three years, after the incident.

However, there was never any ruling that Colorado law did apply. In fact, Costco did not move to dismiss the complaint filed in Montana for lack of jurisdiction or move to change venue. No court ruled on Costco's statute of limitations defense.

Michelletti ultimately fired M&M and obtained different counsel. Michelletti's new counsel settled Michelletti's lawsuit against Costco. Michelletti argues that the settlement value was significantly reduced due to the failure of M&M to file within the statute of limitations.

The district court erred by determining that the third party claims against M&M fell outside the scope of coverage.

First, the district court erred by holding that ALPS bears no duty to either defend or indemnify Michael and M&M for the McConnell and Johnson claims. Because the McConnell and Johnson claims allege various non-theft related claims, ALPS cannot establish that it has no duty to indemnify Michael and M&M

for these other allegations or defend the claim in its entirety. Therefore, summary judgement was inappropriate.

Second, the district court erred by finding that exclusion 1.1.2 of the policy establishes that ALPS has no duty to either defend or indemnify Michael and M&M for the Michelletti claim. The exclusion cited by the district court states:

> 1.1.2 at the Effective Date of this Policy, no Insured knew or reasonably should have known or foreseen that the act, error, omission or Personal Injury might be the basis of a Claim.

Opening Br., App. Tab 9.

The district court found that, because a statute of limitations defense was pled by Costco, David reasonably should have known that his error in missing the statute of limitations would result in a claim. However, there are genuine issues as to whether David reasonably should have known that failing to file in Colorado within two years of the Michelletti incident would lead to a claim.

David did not testify as to his knowledge of Costco's defense. While Costco pled that Colorado law applied, it did not move to dismiss or move to change venue. In fact, ALPS failed to establish that Costco obtained any dispositive ruling on the statute of limitations issue or that the statute of limitations defense raised by Costco diminished the value of the claim.

Resolution of whether David knew or should have known that he had missed a statute of limitations based on the answer filed by Costco will be central to the

pending claim against M&M. Those questions are inappropriate to resolve here. ALPS should not be allowed to advocate for a set of disputed facts to void coverage, but which establish liability as to its insureds. The district court erred by resolving these factual issues in ALPS's favor, and against ALPS's insured.

CONCLUSION

For the reasons set forth above, MTLA respectfully suggests that this Court reverse the decision of the district court and remand the case to the district court for resolution of the factual questions that bear on coverage.

DATED this 14th day of July 2017.

SUBMITTED BY:

/s/ Justin P. Stalpes
BECK, AMSDEN & STALPES, pllc

Attorney for Amicus MTLA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *AMICUS CURIAE* BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION is proportionately spaced in 14-point roman, non-script text and contains 4,921 words excluding brief's cover, table of contents, table of authorities, certificate of compliance and appendix table of contents.

DATED this 14th day of July 2017.

SUBMITTED BY:

/s/ Justin P. Stalpes
BECK, AMSDEN & STALPES, pllc

Attorneys for Amicus MTLA

APPENDIX TABLE OF CONTENTS

CERTIFICATE OF SERVICE

I, Justin P. Stalpes, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 07-14-2017:

Patrick T. Gallagher (Attorney)
P.O. Box 1413
Anaconda MT 59711
Representing: Michael David McLean
Service Method: eService

Timothy B. Strauch (Attorney)
257 W Front Street, Ste A
Missoula MT 59802
Representing: McLean & McLean, PLLP
Service Method: eService

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: ALPS Property & Casualty Insurance Company
Service Method: eService

Bradley J. Luck (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: ALPS Property & Casualty Insurance Company
Service Method: eService

Mikel L. Moore (Attorney)
P.O. Box 7370
145 Commons Loop, Ste. 200
Kalispell MT 59901
Representing: Property Casualty Insurers Association of America
Service Method: eService

Douglas Scotti (Attorney)
341 Central Ave.
Whitefish MT 59937-2618
Representing: Miantae McConnell

Service Method: E-mail Delivery

Sharon M. Morrison (Attorney)
341 Central Ave.
Whitefish MT 59937-2618
Representing: Miantae McConnell
Service Method: E-mail Delivery

William Michael O'Leary (Attorney)
510 E. Park Street, Suite 200
P.O. Box 527
Butte MT 59703
Representing: Joseph Micheletti, Marilyn C. Micheletti
Service Method: E-mail Delivery

Janice M. Casarotto (Attorney)
P.O. Box 3723
Butte MT 59702
Representing: Lillian Johnson
Service Method: E-mail Delivery

Electronically signed by Natalie Phillips on behalf of Justin P. Stalpes
Dated: 07-14-2017